UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

ROBERT GONZALEZ,
KHALIL WILLIAMS, AND
RASHEEM RICHARDSON,

Defendants.

08 Cr. 363 (BSJ)

Opinion and Order

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

On June 25, 2009, a jury found Robert Gonzalez ("Gonzalez"), Khalil Williams ("Williams"), and Rasheem Richardson ("Richardson") (together, "Defendants") guilty of conspiracy to commit robbery, attempted robbery, and use of a firearm in furtherance of the robbery conspiracy in violation of 18 U.S.C. §§ 1951, 924(c), and 2. Gonzalez and Williams were also convicted of possessing a firearm after being convicted of a felony offense, in violation of 18 U.S.C. § 922(g), and Gonzalez was convicted of possession of crack cocaine with intent to distribute, in violation of 21 U.S.C. § 841(1)(C).

All Defendants now move for a post-verdict judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. Gonzalez and Williams also move for a new trial pursuant to

Federal Rule of Criminal Procedure 33. For the reasons stated below, Defendants' Motions are DENIED in their entirety.

BACKGROUND

Defendants were tried on charges contained in an Indictment (the "Indictment") filed on April 22, 2008. That Indictment describes a conspiracy to commit an armed robbery of Media Plaza, an electronics store located at 20 Bruckner Boulevard in The Bronx, New York and engaged in the sale of commodities in interstate commerce within the meaning of the Hobbs Act, 18 U.S.C. § 1951(b)(3). The Indictment alleges that Defendants possessed a .45 caliber Taurus pistol for use in furtherance of the Hobbs Act robbery of Media Plaza. The Indictment further alleges that Gonzalez and Williams had previously been convicted of a felony, and that, at the time of his arrest, Gonzalez possessed crack cocaine with intent to distribute.

Briefly, the evidence at trial established that, on the evening of March 25, 2008, Defendants and Mark Franco ("Franco") were arrested in the area of Media Plaza. At the time of arrest, Williams, Richardson, and Franco were inside Franco's Honda Accord, which also contained duct tape, latex gloves, laundry bags, the .45 caliber Taurus, and a starter pistol that looked like a real gun. Gonzalez was outside the car at the time of arrest, wearing latex gloves and hiding approximately 20 bags of crack cocaine in his buttocks.

LEGAL STANDARD

I. Motion for a Judgment of Acquittal Pursuant to Rule 29 of the Federal Rules of Criminal Procedure

Federal Rule of Criminal Procedure 29(a) provides that "the court on the defendant's motion must enter a judgment of acquittal on any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). Specifically, a court must grant a motion under Rule 29 if there is "no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt." United States v. Irving, 452 F.3d 110, 117 (2d Cir. 2006) (quotation omitted); see also United States v. Guadagna, 183 F.3d 122, 130 (2d Cir. 1999) ("[T]he court may enter a judgment of acquittal only if the evidence that the defendant committed the crime is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." (internal quotation omitted)). "[I]f the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt." United States v. Hawkins, 547 F.3d 66, 71 (2d Cir. 2008). However, "[t]he ultimate question is not whether [the court] believe[s] the evidence adduced at trial established [the defendant's guilt], but whether any rational trier of fact could

so find." United States v. Eppolito, 543 F.3d 25, 45-46 (2d Cir. 2008) (internal quotation omitted). Therefore, "a defendant making an insufficiency claim bears a very heavy burden." United States v. Desena, 287 F.3d 170, 177 (2d Cir. 2002).

In considering the sufficiency of the evidence, the court must "view all of the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor." United States v. Ware, 577 F.3d 442, 447 (2d Cir. 2009). A court must analyze the pieces of evidence not separately, in isolation, but together, in conjunction with one another. See United States v. Autuori, 212 F.3d 105, 114 (2d Cir. 2000) ("We consider the evidence in its totality, not in isolation, and the government need not negate every theory of innocence."). Accordingly, a court must apply the sufficiency test "to the totality of the government's case and not to each element, as each fact may gain color from the others." Guadagna, 183 F.3d at 130.

As the Second Circuit has repeatedly noted, "the task of choosing among competing, permissible inferences is for the fact-finder, not for the reviewing court." United States v. Khedr, 343 F.3d 96, 104 (2d Cir. 2003) (internal quotation omitted). Moreover, "the jury's verdict may be based on entirely circumstantial evidence." United States v. Santos, 541

F.3d 63, 70 (2d Cir. 2008) (internal quotation omitted). Because the jury is entitled to choose which inferences to draw, the government, in presenting a case based on circumstantial evidence, "need not exclude every reasonable hypothesis other than that of guilt." Guadagna, 183 F.3d at 130 (internal quotation omitted). However, "a conviction based on speculation and surmise alone cannot stand." Santos, 541 F.3d at 70.

II. Motion for a New Trial Pursuant to Rule 33 of the Federal Rules of Criminal Procedure

Federal Rule of Criminal Procedure 33(a) provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). In evaluating a Rule 33 motion, "[t]he district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation." United States v. Ferguson, 246 F.3d 129, 134 (2d Cir. 2001). Ultimately, the trial court must be satisfied that "competent, satisfactory and sufficient evidence in the record supports the jury verdict." Id. (internal quotation omitted).

Under Rule 33, trial courts have "broad discretion . . . to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." United States v. Polouizzi, 564 F.3d 142, 159 (2d Cir. 2009) (internal quotation omitted). However, "[t]he defendant bears the burden of proving that he is

entitled to a new trial under Rule 33." United States v. McCourty, 562 F.3d 458, 475 (2d Cir. 2009) (internal quotation omitted). Before ordering a new trial pursuant to Rule 33, "a district court must find that there is a real concern that an innocent person may have been convicted." Id. (internal quotation omitted). Stated otherwise, the court must be satisfied that "it would be a manifest injustice to let the guilty verdict stand." United States v. Sanchez, 969 F.2d 1409, 1414 (2d Cir. 1992) (internal quotation omitted); see also Ferguson, 246 F.3d at 133 ("The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice.").

As the Second Circuit recently reiterated in United States v. Bell:

> Manifest injustice cannot be found . . . unless the judge is prepared to answer "no" to the following question: "Am I satisfied that competent, satisfactory and sufficient evidence in this record supports the jury's finding that this defendant is guilty beyond a reasonable doubt?" In making this assessment, the judge must examine the totality of the case. All the facts and circumstances must be taken into account. An objective evaluation is required. There must be a real concern that an innocent person may have been convicted. It is only when it appears that an injustice has been done that there is a need for a new trial "in the interest of justice."

584 F.3d 478, 483 (2d Cir. 2009) (quoting Sanchez, 969 F.2d at 1414). Given the stringency of this standard, "motions for a new trial are disfavored in this Circuit," United States v.

Gambino, 59 F.3d 353, 364 (2d Cir. 1995), and Rule 33 motions granted only "sparingly and in only the most extraordinary circumstances." Ferguson, 246 F.3d at 134. In particular, a trial court may disregard witness testimony only where it is "patently incredible or defies physical realities." Sanchez, 969 F.2d at 1414. Thus, "[i]t is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment." Id.

DISCUSSION

I. The Evidence Was Sufficient to Establish that Media Plaza Engaged in Interstate Commerce

In their Motions, Richardson and Williams argue that the evidence adduced at trial was insufficient to establish the interstate nexus required for Count One, conspiracy to commit Hobbs Act robbery, or Count Two, attempted Hobbs Act robbery. Based on this argument, Richardson and Williams move for a verdict of acquittal pursuant to Federal Rule of Criminal Procedure 29 on Counts One and Two of the Indictment.

In a Hobbs Act prosecution, proof that "commerce [wa]s affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference." Stirone v. United States, 361 U.S. 212, 218 (1960). However, "it is well established that the burden of proving a nexus to interstate commerce is minimal." United States v. Elias, 285 F.3d 183 (2d

Cir. 2002). Accordingly, "[t]he jurisdictional requirement of the Hobbs Act may be satisfied by a showing of a very slight effect on interstate commerce. Even a potential or subtle effect on commerce will suffice." United States v. Angelilli, 660 F.2d 23, 35 (2d Cir. 1981) (internal citations omitted); accord Jund v. Town of Hempstead, 941 F.2d 1271, 1285 (2d Cir. 1991) ("If the defendants' conduct produces any interference with or effect upon interstate commerce, whether slight, subtle or even potential, it is sufficient to uphold a prosecution under the Hobbs Act.").

For example, in Elias, a defendant was convicted of robbing $1400 in cash, cigarettes, subway MetroCards, telephone calling cards, and food stamps from a neighborhood grocery store in Queens. The evidence that the robbery affected interstate commerce was that the grocery store in question sold beer brewed in Mexico and the Dominican Republic and fruit grown in Florida and California. See Elias, 285 F.3d at 185-86. The Second Circuit upheld the Hobbs Act conviction in this circumstance, finding it sufficient "that the beer and fruit . . . originated out-of-state." Id. at 189.

In the instant case, the evidence at trial was sufficient to demonstrate the minimal connection to interstate commerce required under Second Circuit precedent. Franco testified that, while reconnoitering Media Plaza several days before the alleged

attempted robbery, he noticed that the store carried a Sharp Aquos television for sale. (Tr. 594, 600-05.) Pursuant to a stipulation between the Government and all Defendants, Sharp televisions have never been manufactured in New York State. (See Tr. 1174-75.)

The Government also produced evidence that Media Plaza sold Samsung televisions in the years prior to the robbery, and that Samsung televisions have never been manufactured within New York State. (See Tr. 1173-74 (stipulation between the Government and all Defendants that Samsung televisions have never been manufactured in New York).) Specifically, Lydia Vega, a mail carrier for the United States Postal Service, testified that she had seen a Samsung television inside Media Plaza at some point prior to March 2008. (See Tr. 460-61.) Another witness, Darryl Lewis, testified that he purchased a Samsung television set from Media Plaza in March 2006. (Tr. 738-39.)

This evidence is sufficient to establish the connection to interstate commerce required under the Hobbs Act. The Second Circuit does not require that a defendant have intended or anticipated that his actions would have an effect on interstate commerce. See, e.g., United States v. Silverio, 335 F.3d 183, 187 (2d Cir. 2003) ("We know of no court that has an intent requirement for Hobbs Act prosecutions."); Vasquez v. United States, No. 08 Civ. 860, 2008 WL 4787505 (S.D.N.Y. Oct. 30,

2008) ("It is not an element of a Hobbs Act offense . . . that the defendant have known that his conduct would have an effect on commerce."). In this case, as in Elias, "[s]ince the evidence at trial established that [the store] stocked goods originating out-of-state, the requisite indirect, minimal effect on interstate commerce was thereby sufficiently established." Elias, 285 F.3d at 189.

Therefore, the requisite connection to interstate commerce was established, and Defendants' Motions for a judgment of acquittal on this basis is DENIED.

II. The Evidence Was Sufficient As to Each Defendant on the Firearm Count

Defendants challenge the sufficiency of the evidence as to their convictions on Count Three, the violation of 18 U.S.C. § 924(c), arguing that the Government did not establish their liability on this Count under either an aiding and abetting theory or any other. The Court disagrees.

Section 924(c) states that "any person who, during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall . . . be sentenced to a term of imprisonment of not less than 5 years." 18 U.S.C. § 924(c)(1)(A). "[T]he requirement in § 924(c)(1) that the gun be possessed in furtherance of a . . . crime may be satisfied by a

showing of some nexus between the firearm and the . . . operation." United States v. Finley, 245 F.3d 199, 203 (2d Cir. 2001); see also United States v. Fleurissaint, No. 03 Crim. 906, 2005 WL 120350, at *4 (S.D.N.Y. Jan. 20, 2005) (internal quotation omitted) ("To convict a defendant under the possession prong of § 924(c), the government must establish that a firearm was possessed 'in furtherance of' a [crime of violence], which is satisfied if the firearm in some way helped, furthered, promoted, or advanced the [crime].").

The Court instructed the jury as to three possible theories of liability under Section 924(c): (1) direct or constructive possession of the firearm during and in relation to, and in furtherance of, the robbery conspiracy; (2) aiding and abetting the possession of the firearm during and in relation to, and in furtherance of, the robbery conspiracy; and (3) a Pinkerton theory of liability, under which "a conspirator can be held responsible for the substantive crimes committed by his co-conspirators to the extent those offenses were reasonably foreseeable consequences of acts furthering the unlawful agreement, even if he did not himself participate in the substantive crimes." United States v. Romero, 897 F.2d 47, 51 (2d Cir. 1990).

Defendants argue principally that the Government did not prove that they aided and abetted Franco by facilitating and

promoting the use of the firearm. As the Second Circuit held in United States v. Medina, "a defendant . . . cannot be said to aid and abet the use or carrying of a firearm simply by aiding and abetting the overall enterprise in which the firearm is employed." Medina, 32 F.3d 40, 47 (2d Cir. 1994). Said otherwise, "mere knowledge that a gun would be used [is] legally insufficient to prove aiding and abetting its use." United States v. Wilkerson, 361 F.3d 717, 724 (2d Cir. 2004). Rather, in order to be liable under Section 924(c), a defendant must "both associate[] and participate[] in the use of the firearm in connection with the underlying crime." Medina, 32 F.3d at 46 (internal quotation omitted).

In the instant case, even assuming that only Franco committed the 924(c) offense under a direct theory of liability, Defendants aided and abetted Franco by facilitating and promoting the use of a gun in the planned armed robbery. See Medina, 32 F.3d at 47 ("It could be said that a defendant who is present but unarmed during the commission of a crime may (again, by the division of labor) make it easier for another to carry a firearm and therefore aid and abet that act."). Franco testified that each defendant knew the firearm was in the car and expected to benefit from its use during the robbery. Franco further testified that he had conversations with Gonzalez, Williams, and Richardson about the two guns, and that each of

Defendants knew that one of the guns was a real firearm. (See Tr. 661-72.) Gonzalez and Williams each played a role in procuring the gun. (Tr. 664-65.)

It is therefore clear that each of Defendants was "present . . . at the scene" and planned to play "a critical supportive role in the armed robbery." United States v. Gomez, 580 F.3d 94, 103 (2d Cir. 2009). Unlike in Medina, the evidence demonstrates that "[D]efendant[s] joined and shared in the underlying criminal endeavor" and that their efforts would have "contributed to its success." United States v. Pipola, 83 F.3d 556, 562 (2d Cir. 1996).

Accordingly, because the evidence was sufficient to convict Defendants of a Section 924(c) violation on an aiding and abetting theory of liability, Defendants' Motions for a judgment of acquittal, or, alternatively, for a new trial on this basis must be DENIED.

III. The Evidence Was Sufficient As to Each Defendant on the Attempted Robbery Count

In their Motions, Defendants argue that the Government did not introduce sufficient evidence for a reasonable factfinder to convict Defendants of the crime of attempted robbery. Specifically, Defendants claim that the Government failed to show that Defendants took a "substantial step" towards commission of the crime, as distinguished from mere preparation.

"In order to establish that a person is guilty of an attempt to commit a crime, the government must prove that he (1) had the intent to commit the crime, and (2) engaged in conduct amounting to a 'substantial step' towards the commission of the crime." United States v. Rosa, 11 F.3d 315, 337 (2d Cir. 1993). A substantial step "may be less than the last act necessary before the actual commission of the substantive crime," but it "entails more than mere preparation." Id. As explained in United States v. Stallworth, "the defendant must have engaged in conduct . . . strongly corroborative of the firmness of the defendant's criminal intent." Stallworth, 543 F.2d 1038, 1040 (2d Cir. 1976).

In the instant case, the evidence at trial demonstrated that Defendants intended to commit an armed robbery of Media Plaza, and that Defendants took substantial steps towards committing this robbery before the police interrupted their plans. Franco's testimony, the testimony of several New York City Police Department ("NYPD") officers, phone records submitted by the Government, and the physical evidence recovered by the NYPD make clear that: (1) Defendants obtained the necessary equipment and weapons to commit a robbery, including one handgun, one starter pistol, latex gloves, duct tape, and a business card for the target store, Media Plaza (see, e.g., Tr. 665-68, 671-74); (2) Defendants loaded all of these materials

into Franco's Honda Accord (Tr. 669-74); (3) Defendants drove to Media Plaza on the night in question (Tr. 675-77); (4) Gonzalez exited the car to check out the area on behalf of the group (Tr. 681-86); (5) Gonzalez and Richardson spoke to one another over the point-to-point service of their cellular telephones while Gonzalez was outside the car and Richardson inside (Tr. 683-86); and (6) Gonzalez put on his latex gloves before leaving the car for the final time (Tr. 689-90).[1]

This testimonial and physical evidence provided ample basis from which a reasonable mind might conclude guilt beyond a reasonable doubt. See Irving, 452 F.3d at 117. As in United States v. Jackson, "[Defendants] reconnoitered the place contemplated for the commission of the crime and possessed the paraphernalia to be employed in the commission of the crime . . . which could serve no lawful purpose under the circumstances. . . . [E]ither type of conduct, standing alone, was sufficient as a matter of law to constitute a 'substantial step' if it strongly corroborated their criminal purpose." Jackson, 560

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[1] Franco testified that Gonzalez left the car for the final time with a "mask," (see Tr. 689,) and the Government repeatedly references Gonzalez's alleged possession of a mask in making its argument that Defendants were on the verge of robbing Media Plaza on March 25, 2008 (see, e.g., Gov't Opp'n 30). However, as Williams notes in his pro se reply brief, Detective Badyna testified that when he arrested Gonzalez, Gonzalez had on a wool hat, not a mask. (See Williams Pro Se Reply 3; Tr. 453.)) Therefore, because the mask allegedly carried by Gonzalez was not recovered, the Court does not rely on this evidence in making its determination that the Government did present sufficient evidence for a reasonable factfinder to find Defendants guilty of attempted robbery.

F.2d 112, 120 (2d Cir. 1977). In fact, "[a] jury could properly find that preparation was long since completed. All that stood between [Defendants] and success was a group of . . . police officers." Stallworth, 543 F.2d at 1041.

Because the jury heard ample evidence that Defendants intended to commit an armed robbery of Media Plaza and that they took substantial steps towards achieving this objective, Defendants' Motions for a judgment of acquittal on the attempted robbery count must be DENIED.

IV. Defendants Were Not Deprived of a Fair Trial Because of the Government's Summation

Williams argues that the Court should have granted a mistrial because, during rebuttal, the Government improperly referenced a tip the police had received about possible criminal activity at Media Plaza on the night of March 25, 2008. Specifically, Williams argues that the Government's argument exceeded the scope of the Court's ruling on the admissibility of the "tip" and unfairly bolstered the Government's case. Based on this alleged error, Williams requests that the Court grant a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

As the Second Circuit held in United States v. Rodriguez, "[w]hether a prosecutor's improper statement during summation results in a denial of due process depends upon whether the

improper statement causes substantial prejudice to the defendant." 968 F.2d 130, 142 (2d Cir. 1992); see also Elias, 285 F.3d at 190 ("To warrant reversal, the prosecutorial misconduct must cause the defendant substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process."). "Reversal is warranted only where the statements, viewed against the entire argument before the jury, deprived the defendant of a fair trial." United States v. Forlorma, 94 F.3d 91, 94 (2d Cir. 1996) (internal quotation omitted). Because improper remarks in summation must be viewed against the context of the entire trial, "[i]t is a rare case in which improper comments in a prosecutor's summation are so prejudicial that a new trial is required." Rodriguez, 968 F.2d at 142.

In assessing the alleged misconduct, the Court considers "the severity of the misconduct, the measures adopted to cure it, and the certainty of conviction in the absence of the misconduct." United States v. Parkes, 497 F.3d 220, 233 (2d Cir. 2007). In the instant case, as in United States v. Modica, "the prosecutor's offending behavior was confined to [the] summation: [the] opening statement and . . . conduct throughout the . . . trial were free of improper remarks." 663 F.2d 1173, 1181 (2d Cir. 1981). Moreover, the improper statement was an isolated remark in the Government's lengthy summation and

rebuttal argument. See Parkes, 497 F.3d at 234 ("Isolated remarks are ordinarily insufficient to warrant reversal." (internal quotation omitted)). Ultimately, the challenged statements were an aberration in an otherwise fair proceeding, and did not result in such substantial prejudice as to result in the denial of Defendants' right to a fair trial. See, e.g., Elias, 285 F.3d at 191 (stating that "the severity of the misconduct is mitigated if the misconduct is an aberration in an otherwise fair proceeding").

Likewise, any harm that could have derived from the Government's misstatement was remedied by the Court's (1) sustaining Defendants' objection to the improper remark and (2) instructing the jury not to consider any of the information given to the police for its truth. (See Tr. 1520-21;) see also Forlorma, 94 F.3d at 95 ("Generally, we would not reverse a criminal conviction merely because a prosecutor made an unsupported statement in argument—especially where the trial judge sustained the defendant's objections to it."). While the fact that the jury later requested testimony on the tip indicates that the information was an object of interest in deliberations (see Tr. 1594,) the Court instructed the jury in response to this note that "it would be absolutely improper for you to speculate on what alleged information the police received. . . . You cannot use it in any way whatsoever to

determine your verdict as to any defendant in this case" (Tr. 1609). These instructions were clear and definitive, and cured any possible prejudice that might otherwise have resulted from the Government's improper remark. See, e.g., Shotwell Mfg. Co. v. United States, 371 U.S. 341, 367 (1963) (finding that when a "limiting instruction is clear . . . . [i]t must be presumed that the jury conscientiously observed it"); United States v. Snype, 441 F.3d 119, 129 (2d Cir. 2006) ("[T]he law recognizes a strong presumption that juries follow limiting instructions.").

Finally, the trial record indicates that Defendants would have been convicted even without the improper remarks. See, e.g., Elias, 285 F.3d at 192 ("To prevail, [the defendant] had to show that, absent the isolated impropriety of the prosecutor in rebuttal summation (taken in the context of the entire trial), [he] would not have been convicted."). Defendants were caught with all of the tools needed to commit a successful armed robbery, and a co-conspirator, Franco, gave detailed testimony as to their plans to rob Media Plaza. This was sufficient evidence for a reasonable factfinder to convict them on all counts.

Accordingly, the Government's improper remark during summation did not deprive Defendants of a fair trial, and Williams's Motion for a mistrial on this basis is DENIED.

V. The Evidence Was Sufficient as to Gonzalez on the Narcotics Count

Gonzalez argues in his Motion that the evidence at trial was insufficient to establish that he possessed crack with intent to distribute at the time of his arrest. Specifically, Gonzalez argues that Detective Patrick McKernan, one of the officers present when Gonzalez was strip-searched following his arrest and the drugs hidden in his buttocks found, improperly testified as an expert witness on the question of whether the drugs carried by Gonzalez were more likely to be for personal use or for distribution. Gonzalez claims that because Detective McKernan's allegedly improper testimony was the Government's only basis for arguing that Gonzalez carried crack for distribution rather than for personal use, the conviction for possession with intent to distribute should be vacated.

The Court disagrees. Detective McKernan testified that he had personally been involved in hundreds of narcotics-related arrests, including over one hundred arrests of crack purchasers from whom he recovered crack. (Tr. 1052-56.) Detective McKernan further testified that the average amount of crack recovered from a crack user was one or two bags of crack (Tr. 1056,) and that he could not recall ever recovering more than five bags of crack from a crack user (Tr. 1092.)

The Government relied on Detective McKernan's testimony to argue at summation that, because Gonzalez had more than twenty individually packaged bags of crack, he was a distributor than a user. (See Tr. 1393.) However, Detective McKernan's testimony in itself was limited to what he saw in his personal experiences. As a fact witness, Detective McKernan did not offer any opinion on the significance of the quantity of crack that Gonzalez was carrying at the time of the arrest, nor did he venture into any other areas reserved for properly qualified expert witnesses.

Moreover, Detective McKernan's testimony was not the only evidence from which the jury could have concluded that Gonzalez intended to distribute the crack in his possession. For example, a conviction for possession with intent to distribute may be supported by evidence that the defendant carried a large quantity of drugs which most likely would exceed an amount desired for personal consumption. See United States v. Gaviria, 740 F.2d 174, 185 (2d Cir. 1984). Intent to distribute has also been inferred in cases "where small amounts of drugs have been packaged in a manner consistent with distribution." United States v. Garrett, 903 F.2d 1105, 1113 (7th Cir. 1990), cited in United States v. Wallace, 532 F.3d 126, 131 (2d Cir. 2008).

Moreover, it is undisputed that that Gonzalez was not carrying a pipe or any other equipment necessary to use crack

cocaine at the time of his arrest. (See Tr. 360-61.) The jury could certainly consider the absence of materials frequently found on drug users in finding that Gonzalez was a dealer rather than an addict. See, e.g., United States v. Gamble, 388 F.3d 74, 76-77 (2d Cir. 2004) (noting, in the course of upholding a conviction for possession of crack with intent to distribute, that the Government "demonstrated an absence of any indication that [defendant] smoked or otherwise ingested the cocaine base himself" and that "[n]o pipes, cigarettes, cooking implements, or other paraphernalia normally associated with personal drug use were found" in a search of defendant's apartment).

Because Detective McKernan's testimony was perfectly proper, and because the jury could reasonably infer from the evidence presented that the crack Gonzalez possessed was for distribution rather than personal use, Gonzalez's motion for a judgment of a acquittal or a new trial on this basis is DENIED.

VI. The Court Did Not Err in Failing to Instruct the Jury on an Overt Act Requirement for the Hobbs Act Conspiracy Count

Richardson and Williams both argue that the Court improperly failed to instruct the jury with respect to an overt act requirement for the Hobbs Act conspiracy count. (See Richardson Mot. 16-18; Williams Mot. Ex. A ("Williams Pro Se Mot.") 4.) This argument fails because there is no overt act requirement for conspiracy to commit robbery under 18 U.S.C. §

1951. See, e.g., United States v. Clemente, 22 F.3d 477, 480 (2d Cir. 1994) ("In order to establish a Hobbs Act conspiracy, the government does not have to prove any overt act."); United States v. Maldonado-Rivera, 922 F.2d 934, 983 (2d Cir. 1990) ("The government need not prove an overt act in order to establish a Hobbs Act conspiracy."). Therefore, the Court did not err in failing to deliver an overt-act instruction.

Accordingly, Richardson and Williams's Motions for a verdict of acquittal or, in the alternative, for a new trial on this basis is DENIED.

VII. The Indictment Was Not Unconstitutionally Vague

Williams argues that Counts Two and Three are "duplicitous and vague." (See Williams Pro Se Mot. 9-12; Williams Reply Mot. Ex. A ("Williams Pro Se Reply") 9.) Specifically, Williams argues that Count Two was vague because "it utterly fails to describe the acts concerning who did what to aid and abet whom" (Williams Pro Se Mot. 9) and duplicitous because it "charges two distinct offenses, Title 18 U.S.C. 1951 and 2." (Id.) Williams further argues that Count Three was vague, because "it charges the defendants with aiding and abetting, but there are no facts in the indictment to determine who did what to aid and abet whom." (Id. 10.)

Contrary to Williams's assertions, the Indictment was neither duplicitous nor vague. The Sixth Amendment guarantees

that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. To satisfy these requirements, however, "an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime." United States v. Stavroulakis, 952 F.2d 686, 963 (2d Cir. 1992). Stated otherwise, the Constitution requires only that an indictment contain the elements of the offense in sufficient detail to fairly inform the defendant of the charges he must meet and to enable him to plead double jeopardy in any future prosecution for the same offense. See United States v. Resendiz-Ponce, 549 U.S. 108 , 107-08 (2007). The Indictment in the instant case provided Williams with ample notice of the charges against him, and thus satisfied the constitutional requirements of the Sixth Amendment.

To the extent that Williams objects to the fact that the jury was charged with alternate theories of liability on Counts Two and Three, this argument also fails. As the Second Circuit noted in United States v. Masotto, "[w]hen the jury is properly instructed on two alternative theories of liability, as here, we must affirm when the evidence is sufficient under either of the theories." Masotto, 73 F.3d 1233, 1241 (2d Cir. 1996); see also Copeland-El v. United States, No. 08 Civ. 1383, 2008 WL 5220829,

at *1 (E.D.N.Y. Dec. 12, 2008) ("The Court instructed the jury as to aiding and abetting and Pinkerton liability on the unlawful use of a firearm count pursuant to 18 U.S.C. § 924(c). There is nothing inappropriate about a jury being presented with multiple theories of liability.").

Because the Indictment was neither vague nor duplicitous, Williams's Motion for a new trial on this basis is DENIED.

VIII. Mark Franco's Alleged Perjury Does Not Warrant a New Trial

Williams claims that Franco perjured himself on a number of points during his testimony, and thus that this Court should grant Williams a new trial pursuant to Federal Rule of Criminal Procedure 33. (See Williams Pro Se Reply 2-4.)

In the Second Circuit, perjury requires a showing that a witness gave "false testimony concerning a material matter with the willful intent to provide false testimony, as distinguished from incorrect testimony resulting from confusion, mistake, or faulty memory. Simple inaccuracies or inconsistencies in testimony do not rise to the level of perjury." United States v. Monteleone, 257 F.3d 210, 219 (2d Cir. 2001).

Once this threshold demonstration of perjury has been met, however, a new trial is not foreordained. On the contrary:

> Whether the introduction of perjured testimony requires a new trial depends on the materiality of the perjury to the jury's verdict and the extent to which the

> prosecution was aware of the perjury. With respect to this latter inquiry, there are two discrete standards of review that are utilized. Where the prosecution knew or should have known of the perjury, the conviction must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. Indeed, if it is established that the government knowingly permitted the introduction of false testimony reversal is virtually automatic. Where the government was unaware of a witness' perjury, however, a new trial is warranted only if the testimony was material and the court is left with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.

United States v. Wallach, 935 F.2d 445, 456 (2d Cir. 1991) (internal quotations omitted). In the instant case, even assuming that Franco's statements were in fact deliberately false, Williams has submitted no evidence indicating that the Government was aware or should have been aware of Franco's perjury. Therefore, the question must be analyzed under the second standard: whether the Court believes that, but for the challenged testimony, Williams would not have been convicted. See id.

Analyzed in that light, the Court finds that Williams would have been convicted even without the challenged statements by Franco. The factual points that Williams attacks are tangential: for example, the questions of (1) whether Williams, or any of Defendants, were members of the Bloods, (2) whether Gonzalez had a mask when he left the Honda Accord for the final time, and (3) who recruited the owner of the 16-passenger van to

assist with the robbery. (See Williams Pro Se Mot. 1-3; Williams Pro Se Reply 1-4.) Even if Franco's statements were false on these points, this testimony would not have affected the jury's verdict. Given the weight of evidence against Williams, this Court cannot find that "the jury probably would have acquitted in the absence of the [allegedly] false testimony." United States v. McCourty, 562 F.3d 458, 476 (2d Cir. 2009).

Accordingly, Williams's Motion for a new trial on the basis of Franco's alleged perjury is DENIED.

CONCLUSION

For the reasons stated above, Defendants' Motions for a judgment of acquittal or, in the alternative, for a new trial are DENIED in their entirety.

SO ORDERED:

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
May 11, 2010